COURT NO. 2

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Appeal from Order No. 901 of 2001
(Old No. 296/2000)

National Insurance
Company Ltd. … **Appellant.**

Versus

Smt. Devki Devi
and others. … **Respondents.**

Coram : Hon'ble P.C. Verma, J.
Hon'ble B.S. Verma, J.

This appeal has been preferred under Section 173 of the Motor Vehicles Act, 1988 ***(in short the Act)*** against the judgment and Award, dated 12-08-1999, passed in M.A.C. Case NoS. 817 & 818 of 1992, Smt. Devki Devi and others Vs. Rajendra Singh and others, by Motor Accident Claims Tribunal/II Addl. District Judge, Nainital ***(in short the Tribunal)***, whereby the learned Tribunal has allowed the claim petition and has awarded Rs.2,70,000/- as compensation along with interest @ 10% per annum, as mentioned in the impugned order, in favour of the claimants-respondents under Section 166 of the Act. Aggrieved, the Insurance Company-appellant has come up in appeal for setting aside the impugned judgment and award passed by the learned Tribunal on the ground that the accident in question was not the result of rash and negligent on the part of driver of the appellant, but the motor accident was the result of sole negligence driver of Tempo, who has not been impleaded as party and the Tribunal has failed to appreciate the evidence on the point of income of the deceased and has challenged the quantum of award.

Facts in brief are that are that on 11.4.92, Bishan Lal (***the deceased)*** was going from Rudrapur to Dineshpur by Tempo UST-1532. At 7 p.m., when the said Tempo reached near Jafarpur

Sugarcane Centre, then a matador No. DDV-5765 driven rashly and negligently by its driver collided with the said Tempo from the opposite direction, with the result the deceased sustained grievous injuries. He was rushed to Rudrapur by the driver of the Tempo, where he was declared dead. The deceased was employed in Redcross Society Gularbhoj and was getting salary of Rs. 1,397-20 and he was earning above Rs. 2000/- per month from all sources. The longevity of the deceased is stated to be 70 years, had there been no accidental death. Hence the petition for compensation by the dependents and legal heirs of the deceased.

The Opposite Party No. 1 Rajendra Singh, owner of the matador in question, contested the claim petition by filing his written statement. He has admitted that the vehicle was duly insured with the appellant-Insurance Company and it was being driven by a skilled driver, therefore, the liability for compensation rests on the Insurance Company.

The Insurance Company-appellant has filed its written statement, 25-Kha and has asserted that the claimants/insured have not produced the details of Insurance Policy and no information was given to it by the insured, therefore, the petition is not maintainable. It has also been pleaded that the Tempo driver was not physically and mentally fit to drive the Tempo and the alleged accident was result of negligence of tempo driver, therefore, the Insurance Company of the offending vehicle (matador) cannot be held liable. Plea of not holding of valid driving licence by the driver of the said matador was also taken. The vehicles in question were not possessing valid permit, fitness certificate at the time of accident. Quantum of compensation as claimed has been challenged and it has been stated that amount of compensation is excessive. Insurance Company can be fastened liability of compensation considering the provisions of Section 64 of the Insurance Act.

The Opposite Party No.2, owner of the Tempo in question has not put in appearance despite service of summons, therefore, the case proceeded ex-parte against him.

The learned Tribunal framed three Issues in the case. Issue No.1 related to rash and negligent driving by the driver of vehicle No. DDV-5765 resulting into motor accident with Tempo No. UST 1532. Issue No.2 related to contributory negligence on the part of the driver of the tempo in question. Issue No. 3 related to relief and compensation.

After considering the evidence on record, the learned Tribunal took Issue Nos. 1 and 2 together for decision. The learned Tribunal has relied on the testimony of P.W.3 Jamuna Datt, who is the alleged witness of the accident. This witness is said to be travelling by the Tempo in which the deceased was also sitting. Certified copy of the F.I.R. (paper no. 6-C/2) is on record, which shows that report was lodged with the police and it has been said that the accident in question had taken place due to rash and negligent driving by the driver of the matador in question. Relying on the statement of P.W.3 Jamuna Datt, who has given ocular account of the accident, the Tribunal has held that the motor accident was caused due rash and negligent driving by the driver of the matador no. DDV-5765. . On Issue No.3, the Tribunal after considering the material on record found that deceased was getting Rs. 1350/- per month as salary. Deceased was held to be aged 35 years. Ultimately, the Tribunal has worked out the total loss of dependency taking into consideration the remaining period of 25 years of service of the deceased. Ultimately, the learned Tribunal has awarded total compensation of Rs. 2,70,000/- along with interest @ 10% per annum in favour of the claimants and against the appellant-Insurance Company, as mentioned in the impugned order.

We have heard learned counsel for the appellant, Sri Lalit Belwal, and have carefully gone through the entire material on record including the impugned judgment and award.

It has been argued on behalf of the appellant-Insurance Company that the learned Tribunal has not recorded any categorical finding in respect of Issue No.2, which has been framed on the pleadings of the Insurance Company. From a perusal of the record, it is evident that the learned Tribunal has framed Issue No.2 to the following effect:

> ***"Whether the accident took place due to the rash and negligent driving of tempo no. UST 1532 and the accident took place due to the contributed negligence of the driver."***

The Tribunal has taken up Issue Nos. 1 and 2 together and has relied on the evidence of Jamuna Datt, P.W.3, who has appeared in the witness box from the side of the claimants and has given eye witness account of the motor accident in question. The witness has clearly stated that on the fateful day he was going along with Bishan Lal ***(the deceased)*** in the Tempo No. UST-1532 and at about 7 p.m. when he reached near Jafarpur Sugarcane Centre, a matador coming from the opposite direction hit the tempo with the result the passengers sitting in the tempo sustained injuries. The deceased sustained grievous injuries. He was rushed to hospital, where the deceased died. Further, paper no. 6-C/2 is certified copy of the F.I.R. in which the cause of accident has been mentioned as rash and negligent driving of the driver of Matador No. DDV-5765. Post Mortem of the deceased was also conducted and the report thereof is also on record. Thus, from the oral and documentary evidence on record, it is sufficiently established that the cause of death was rash and negligent driving by the driver of the Matador in question. The Tribunal has considered all the material on record and has recorded a categorical finding that it is not a case of contributory negligence. We are unable to take a

different view of the point. The Tribunal has also framed Issue No.1 relating to the rash and negligent driving of the driver of the vehicle Matador DDV-5765. Both Issue Nos. 1 and 2 have been taken up together for decision. The argument of the learned counsel that no finding has been recorded on the Issue No.2 is therefore not tenable.

It has further been submitted by the learned counsel for the appellant that the quantum of compensation has not been properly calculated on the income of the deceased. It is now well settled law that the Insurance Company cannot challenge the finding on the point of rash and negligent driving as well as quantum of compensation in appeal. We are supported in our view by the Apex Court judgment in the Case of ***"National Insurance Company Ltd. Chandigarh Vs. Nicolletta Rohtagi and others" [(2002) 7, Supreme Court Cases, 456]***. In that case, it has been observed by the Apex Court that ***"even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regard negligence or contributory negligence of the offending vehicle".*** Thus, in view of the law laid down by the Apex Court reported in ***(2002) 7, S.C.C. 456 (supra),*** which is fully applicable in the present appeal, none of the contentions raised on behalf of the appellant is tenable and has to be ignored outright.

No other point was urged or argued before us.

Ultimately, we are of the view that the present appeal is devoid of merit and must fail.

The appeal is dismissed. The impugned judgment and award is upheld. No order as to costs.

The amount in deposit with this Court be remitted to the Motor Accident Claims Tribunal concerned. The Tribunal shall inform the claimant-respondents to withdraw the amount of Award, if any.

24-08-2004 **(B.S. Verma, J.)** **(P.C. Verma, J.)**
RCP